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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE,

Plaintiff and Respondent,

v.

GREGORY PHILLIP LEONDES,

Defendant and Appellant.

E063973

(Super.Ct.No. INF10001097)

OPINION

APPEAL from the Superior Court of Riverside County. Graham Anderson Cribbs, Judge. Affirmed with directions.

Richard Schwartzberg, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Eric A. Swenson, Lise Jacobson and Kristine A. Gutierrez, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant and appellant Gregory Philip Leondes and Jane Doe were friends but also engaged in sexual relations. On May 6, 2010, they went to a nightclub in Palm

Springs and returned to her home after 2:00 a.m. They argued about money she owed to him, and that she ignored him at the club. While she was lying on her stomach on her bed texting on her phone, he grabbed her and flipped her over. He straddled her, held down her arms and hit her. He forced her to take her clothes off and he began biting her breasts. He strangled her neck with one hand until she passed out. She regained consciousness and distracted defendant by asking for a cigarette, which was in another room. When defendant got up, she kicked out the screen on her third-story window and lowered herself out the window. She eventually dropped to the ground.

Defendant was convicted in count 1 of attempted rape (Pen. Code, §§ 664, 261, subd. (a));¹ in count 2 of assault by means of force likely to cause great bodily injury (§ 245); and assault with intent to commit a sexual offense (§ 220) in count 3.² The jury further found true for these counts that defendant inflicted great bodily injury on Doe (§ 12022.7, subd. (a)). Defendant was sentenced to nine years in state prison.

Defendant makes the following claims on appeal:

1. The trial court violated his federal and state Constitutional due process and confrontation rights by excluding evidence of video captures of defendant and Doe engaging in consensual sex.

¹ All further statutory references are to the Penal Code unless otherwise indicated.

² Defendant was also charged with making a criminal threat (§ 422) and seeking to dissuade a witness (§ 136.1, subd. (c)(1)) but the jury found him not guilty of these charges.

2. Evidence of a prior sexual battery he committed against another woman was improperly admitted pursuant to Evidence Code section 1108.

3. The abstract of judgment must be corrected to properly reflect the conviction in count 2.

We agree the abstract of judgment should be amended to properly reflect the conviction in count 2. We otherwise affirm the judgment.

FACTUAL AND PROCEDURAL HISTORY

A. FACTUAL HISTORY

1. *THE INCIDENT BETWEEN DEFENDANT AND DOE*

Doe moved to Los Angeles with Paul Nissley in 2008. They had a business together and dated. Defendant worked at a locksmith shop across the street. Nissley and defendant became friends. In 2008 or 2009, Nissley allowed defendant to live with him and Doe for six to eight months. Doe got concerned that defendant was spying on her while she was taking a shower. They asked him to move out. Despite Doe's concerns about defendant spying on her, she continued to see defendant after he moved out. She admitted that in the beginning of May 2010, she was at defendant's house almost every day.

She and defendant had sex three times prior to May 7, 2010. Doe explained that the first time they had sex, she was drunk. She believed that defendant videotaped them having sex. On the second occasion, she was sleeping on the couch at defendant's house. Nissley had been at the house but left. She was lying on her stomach and defendant got on top of her. She told him no and thought that he raped her, but she never reported it to

the police. The third time they had sex at her apartment was just before the night of May 6, 2010. Again she said he forced her to have sex. Defendant was not someone who she would normally sleep with; she only did so when she was drunk. She did not tell anyone about her relationship with defendant because she was ashamed.

On May 6, 2010, she wanted to go to a nightclub in Palm Springs with a girlfriend. She and defendant were at her apartment which was at the Pickfair Street Apartments in Cathedral City and she asked defendant to drive her to the club. While they were getting ready to go, they were drinking hard alcohol. They went to the club together and she met up with her girlfriend. She drank a lot at the club. She did not see defendant most of the night.

At the end of the night, defendant drove her back to her house. He was upset with her because he did not see her at the club. He thought they were on a date but she just thought he was her driver. He asked if he could sleep on her couch and she agreed. She went to her room, “plopped” down on her bed on her stomach and texted a male friend.

As Doe was lying on her bed texting, defendant entered her bedroom. He grabbed her left ankle, pulled her and flipped her over. He got on top of her and pinned her arms down. She could only move her fingers and feet. He started hitting her in the face and the ribs. She stopped texting when he grabbed her ankle. Defendant told her he was going to get what she owed him.³

³ Defendant had previously paid a bill for Doe and she agreed to pay him back weekly. She recalled she owed him about \$4,000.

Doe told him to stop but he kept hitting her as hard as he could. Defendant told her she was going to die that night and that no one was going to help her. He also told her if she got away, he would find her and kill her.

Defendant told her to help him get her clothes off. She did not recall how all of her clothes were taken off but at the end she was naked. He proceeded to suck and bite on her breasts. She screamed when he bit her breast and he hit her for screaming. Defendant started strangling her with just one hand. She had trouble breathing and everything went dark. She thought she was going to die.

Doe regained consciousness. She told defendant they were supposed to be friends. She suggested they smoke a cigarette together. She told him to go get the cigarettes that were on the counter in the kitchen. Defendant got off of her. She ran to the window, kicked out the screen and started lowering herself out the window. Defendant ran toward the window to grab her but she let go even though her apartment was on the third floor.

Daniel Jordan lived below Doe in the Pickfair Apartments. In the early morning hours of May 7, 2010, he heard loud sounds coming from Doe's apartment. He heard arguing but could not decipher the sounds. Around 3:30 a.m., he went out on the patio to smoke a cigarette. It was then he saw Doe, naked, hanging from her window. She dropped from the window and landed on her back. She was motionless. He called the police.

Fire officials and paramedics responded to the apartment complex at approximately 3:48 a.m. They found Doe on the ground near the apartments. She was curled up trying to cover herself with her arms. She expressed that she was embarrassed.

A third-story window at the apartment complex was open and the screen was hanging from the window. Doe's face was "very swollen." She complained of neck pain and pain to her cheek. Doe was transported to the hospital. Doe told one of the fire officials she was attacked.

Cathedral City Police Officer Jose Nunez responded to Doe's apartment. When he arrived, Doe was sitting on the ground naked. A third floor window was partially open and the screen was hanging down. Doe appeared to be in pain. She was crying and moaning. Her right cheek was swelling. She told Officer Nunez her left side hurt. He asked her what happened and she did not respond. He could smell alcohol on her breath and her speech was slurred. Officer Nunez tried to get her to tell him what had happened but she was uncooperative.

Officer Nunez headed to her apartment after she left for the hospital. He encountered defendant outside the apartment building. He was not attending to Doe; he was about 50 feet from her on the street. Defendant was not acting normal. Defendant acknowledged he knew Doe. He told Officer Nunez and another officer at the police station he had been in the living room of her apartment and she had been in her bedroom arguing with someone on the phone. He then heard nothing. He went in the bedroom and she was gone. The window was open. He looked out the window and saw her on the ground.

Defendant told Officer Nunez he and Doe had been involved sexually but it had ended three months prior to the incident. He denied they were having sex that night. When asked if he accidentally pushed her out the window, he said, "Are you kidding me? I

didn't do anything to her." Officer Nunez went into the apartment. There were no signs of a struggle in either the living room or the bedroom. There was no blood nor any broken items. Officer Nunez tried to talk to Doe at the hospital but she was uncooperative.

Doe woke up in the hospital and remained there until May 10. When she woke up her ribs hurt—she thought they were broken—and her “face was broken.” One of the bones in her face apparently “cracked.” She also believed that a piece of her tailbone broke. She wore a neck brace in the hospital and had two black eyes. She had bruises and finger marks on her neck from what she believed was where defendant tried to strangle her. Her face on the right side was swollen. She had difficulty eating because her jaw hurt.

When she left the hospital, she went straight to the police station. Although she spoke with police at the scene (but could not remember what she had said) and at the hospital, she was not conscious and wanted to make sure the police knew what defendant had done to her. Doe told the police she only had sex with defendant one time prior to May 7. She lied because she was embarrassed and did not want anyone to know she was having sex with defendant.

Doe admitted she “downplayed” the amount of alcohol she drank to the officers. She actually had a lot to drink that night. She thought when she got out of the hospital she had multiple broken ribs; she testified at the preliminary hearing she had broken ribs. Doe felt like the encounter between her and defendant lasted for two hours but she did not look at a clock. The last text message she sent was at 3:25 a.m. No one else used her

telephone that night. Defendant never penetrated her vagina. She had testified at the preliminary hearing he patted her vagina but she no longer could recall that at trial. She screamed during the entire incident.

On May 7., at around 4:30 a.m., defendant called Nissley. Defendant told Nissley that Doe was involved in an accident. Defendant told him that things “got a little bit ugly” between them. They had an altercation and she got hurt. Defendant did not describe the details of the altercation. Defendant told Nissley she jumped out of the three-story window.

Kathryn Stonick had worked with defendant and they were friends. Defendant spoke with Stonick about his relationships. He had shown her a naked photograph of Doe. In May 2010, defendant told her about an incident where he and Doe went out to a club and got drunk. They ended up getting into a fight. He said that things “got a little out of hand.” Doe got hurt and he was being investigated. Defendant was clear that they had sex that night.

Joseph Falcone had been friends with defendant since 2006 and lived with defendant on May 7. Doe frequently came to their house along with Nissley. Defendant came home on the morning of May 7 and said there had been a problem with Doe. Defendant told Falcone that they had an argument over money that she and Nissley owed defendant. After they argued, he noticed that she was missing. He went to her bedroom and found her hanging from the window. He tried to grab her but she fell.

Falcone had witnessed Doe spend the night on more than one occasion with defendant prior to this incident. Falcone heard noises that sounded like they were having sex. He saw them before they went to the club; they appeared to be a couple.

2. *PRIOR INCIDENT BETWEEN NISSLEY AND DOE*

Doe and Nissley had gotten into a fight in 2009. He called her a “Hollywood Whore.” They hit each other. She escaped out a window of the motorhome they were staying in. She called the police because she was afraid when she hit him that she hurt him because he was ill. She had a lot of pain in her eye and cheek after the incident.

On February 7, 2009, Palm Springs Police Officer Matthew Crampton investigated an incident involving Doe. He contacted her at her residence in Palm Springs. Her right eye was swollen and there was bruising. Her eye was almost swollen shut. Doe reported that Nissley hit her. Doe also expressed she was concerned about Nissley’s health. She was somewhat uncooperative.

3. *PRIOR INCIDENT BETWEEN DEFENDANT AND KEOSHA CAMPBELL*

Keosha Campbell worked as a medical assistant at Palm Desert Urgent Care. On February 25, 2008, defendant came to the facility that day for treatment. At the time, defendant was married to a staff member who worked at the front desk.

They were in a room together preparing him for a procedure. He started “coming on” to her. He pinned her against a wall. He pressed his body against her. He said that she was sexy. He pulled at her shirt and touched her breasts. She pulled her blouse back; he said it turned him on.

B. DEFENSE EVIDENCE

Defendant recalled Nissley. Nissley insisted that he did not hit Doe in 2009. He confirmed they were in a motorhome and she went out the window to get away from him.

Defendant recalled Falcone. Falcone went to Doe's apartment the day after the incident to feed Doe's cat. He looked out her bedroom window and noticed what looked like a broken sprinkler head on the ground below the window.

Cathedral City Police Officer Kelly Nava interviewed Doe on May 11. Doe told Officer Nava that she and defendant left the club around 1:45 a.m. She told him he could sleep on the couch. She was on her telephone when defendant came into her room and flipped her over. He tried to sexually assault her and then physically assaulted her. This occurred over a two-hour period. After the two-hour period, he went to the living room to get a cigarette and she fled out the window. She reported to Officer Nava she sustained rib fractures and facial fractures. She told Officer Nava that defendant tried to strangle her but could not describe how it happened. She said she only had a few drinks that night.

Doe told Officer Nava she and defendant had sex one time before this incident; she was intoxicated and he apologized the next morning because he felt he had taken advantage of her. Officer Nava observed bruising around Doe's neck and her voice was raspy. This was consistent with her being strangled. Her face was swollen.

Doe sent her last text message at 3:25 a.m. and the police were called around 3:48 a.m. The distance between the window and the ground was 21 feet.

Cathedral City Police Officer Michael Mauch interviewed Doe on May 10 at the police station. She was wearing a hospital gown. She had a large bandage around her torso. Doe told him that she and defendant were just friends. They left the club that night at 1:30 a.m. and arrived home at 1:45 a.m. Defendant assaulted her by hitting her in the face and torso. He assaulted her for two hours by hitting her in the face and ribs. She created the ruse with the cigarette and jumped out the window. She told Officer Mauch she had several cracked ribs and a dislocated jaw. She also said she only had two drinks that evening. She had several bruises on her body including her face and shoulder. She had red marks on her neck.

Debbie Benes was a registered nurse and legal nurse consultant. As a legal nurse consultant, she reviewed medical records for cases such as medical malpractice cases and elder abuse. She had previously testified in court as an expert. She reviewed Doe's medical records. Doe arrived at the hospital complaining of jaw pain, back pain, chest pain, neck pain and complained that she had broken ribs.

She did have a fracture of the orbital bone around her eye and fractures on both sides of her nose. She had a fracture in her lower back which was consistent with falling on her bottom. She did not have any broken ribs. She did not have a dislocated jaw. The break of the orbital bone would cause swelling and redness. Nothing in the records showed that she had injuries that appeared to be caused by strangulation. The records did not show she had trouble talking. Her blood alcohol level was .17 when she was admitted to the emergency room, which was high. The bruising on her neck was not

reported in the medical records even though the bruising showed up in photographs of her taken on May 10.

Benes believed that a person who was repeatedly assaulted for two hours would have massive bruising and broken ribs. She had no experience with victims of strangulation. She was being paid for her testimony.

DISCUSSION

A. EXCLUSION OF DEFENSE EVIDENCE

Defendant contends the trial court erred by refusing to admit video captures of defendant and Doe having sex. The exclusion of such evidence violated his right to confrontation and to present a defense under the Fifth and Sixth Amendments to the federal Constitution.

1. *ADDITIONAL FACTUAL BACKGROUND*

At the preliminary hearing, Doe was asked if she had ever had sex with defendant. She admitted she had sex with him prior to this incident, “probably about three or four, maybe, at the very most.” She admitted she told police officers near the time of the incident that she only had sex with defendant one time.

Prior to trial, defendant’s counsel sought to have video captures of a sex tape recorded by defendant admitted into evidence. First, the tapes were admissible to show that they had a relationship as “[a]rguably, sex tapes are not routine fare with those having minimal sexual contact.” In addition, defendant’s counsel sought to admit the tapes to attack her credibility. Defendant’s counsel wanted to show that she changed her

testimony at the preliminary hearing from what she had told the police because she found out about the sex tapes.

Defendant's counsel also stated, "The sex tapes are only relevant, I think, to the extent of their sexual relationship. If she were to admit they had a sexual relationship and ends it there, then there would be no problem. She didn't." The People responded that at the preliminary hearing she admitted they had a sexual relationship so it was not an issue. Defendant's counsel was concerned that Doe was going to minimize and make much less of the sexual relationship when testifying.

The trial court issued a tentative ruling. "The issue of the so-called sex tape is beyond the pale with regard to what it is that is expected to be brought out in this case unless she makes a 180-degree turn with regard to what this relationship amounted to." Defendant's counsel was concerned about where the line was as to her minimizing their relationship. The trial court responded, "Well, I tell you what, I'm hard pressed to see how it is that the testimony is going to come out that it's going to lead into the necessity of getting into what you folks have labeled the sex tapes." Defendant's counsel again argued that if she minimized their relationship, the sex tapes were relevant. He argued, "My client's position is that they dated for six months and had an extensive sexual relationship. I think if she tends to minimize it, then the sex tape issue comes in because arguably people who only have sex rarely on one or two occasions don't make sex tapes. This is argument. That's for the jury to decide."

The trial court concluded, "We're not going to get into the sex tapes, and if you get to a point where you think you need to, then you call time out and we'll go talk." The

People noted that the sex tapes were not relevant because it was not a consent case.

Defendant's counsel clarified it was relevant because Doe lied about their relationship.

The evidence only went to her credibility.

Defendant's counsel later argued that the sex tapes were relevant because Doe had initially told the police they had no dating relationship. However, it was defendant's theory that she found out that the sex tapes had been turned over to the People. She testified at the preliminary hearing about the relationship because she became aware of the tapes. The People did not disagree that Doe could be asked about her relationship with defendant, but the sex tapes were irrelevant and prejudicial.

Defendant again argued it was clear Doe was coached between the time of her statements to police and her preliminary hearing testimony that the sex tapes existed. Defendant's counsel argued he had a right to inquire if anything influenced her testimony. The trial court noted that defense counsel could ask her which statement was true: the one to police or the one at the preliminary hearing. The trial court concluded the discussion.

Defendant's counsel again tried to explain to the trial court it wanted the sex tapes admitted in order to show why Doe changed her testimony between talking to the police and the preliminary hearing. The trial court stated it had already ruled on the issue three or four times and it would not address it again.

2. ANALYSIS

“‘Relevant evidence’ means evidence, including evidence relevant to the credibility of a witness or hearsay declarant, having any tendency in reason to prove or

disprove any disputed fact that is of consequence to the determination of the action.” (Evid. Code, § 210.) Evidence Code section 352 provides “The court in its discretion may exclude evidence if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury.”

“Ordinarily a criminal defendant’s attempt ‘to inflate garden-variety evidentiary questions into constitutional ones [will prove] unpersuasive. ‘As a general matter, the ‘[a]pplication of the ordinary rules of evidence . . . does not impermissibly infringe on a defendant’s right to present a defense.’ [Citations.] Although completely excluding evidence of an accused’s defense theoretically could rise to this level, excluding defense evidence on a minor or subsidiary point does not impair an accused’s due process right to present a defense.’”” (*People v. Thornton* (2007) 41 Cal.4th 391, 443.)

“Within the confines of the confrontation clause, the trial court retains wide latitude in restricting cross-examination that is repetitive, prejudicial, confusing of the issues, or of marginal relevance.” (*People v. Frye* (1998) 18 Cal.4th 894, 946, disapproved of on other grounds in *People v. Doolin* (2009) 45 Cal.4th 390.) As such, “unless the defendant can show that the prohibited cross-examination would have produced ‘a significantly different impression of [the witnesses’] credibility’ [citation], the trial court’s exercise of its discretion in this regard does not violate the Sixth Amendment.” (*Frye*, at p. 946.)

The trial court did not abuse its discretion by refusing to admit video captures from a sex tape involving defendant and Doe. It was apparent from Doe’s testimony that

she had minimized their relationship when she first spoke with the police. She insisted she was embarrassed and did not want anyone to know about their sexual relations. It was clear that Doe was not being forthcoming about the extent of their relationship. The jury was well aware that Doe had changed her testimony from the time she spoke with police and at the preliminary hearing. The video capture had only marginal relevance as to Doe changing her testimony. The jury was already aware that there was a sex tape made, and also that defendant had shown a naked picture of her to Stonick. It was apparent they were involved in a more serious relationship than that described by Doe. Showing these video captures was merely an attempt to shock the jury and was more prejudicial than probative.

Moreover, defendant was not foreclosed from attacking Doe's credibility in regard to her denial of a relationship. He presented the testimony of Officer Nava, that Doe only had sex with defendant one time prior to this incident and that she had been drunk. Falcone, defendant's roommate, confirmed defendant and Doe were in a relationship and had sex prior to the night of this incident. Defendant also presented evidence that Doe had falsely accused Nissley of assaulting her in the past. Additionally, defendant was able to attack her credibility by showing the assault did not last for two hours, she did not have broken ribs and her story had changed. The admission of video capture evidence showing them in sexual positions would not have produced a significantly different impression of Doe's credibility. (*People v. Frye, supra*, 18 Cal.4th at p. 946.) There was no violation of defendant's Sixth and Fifth Amendment rights under the federal Constitution.

Even if we were to consider the trial court erred by excluding the evidence, “the trial court merely rejected some evidence concerning a defense, and did not preclude defendant from presenting a defense, any error is one of state law and is properly reviewed under *People v. Watson* [1956] 46 Cal.3d [818,] 836.” (*People v. McNeal* (2009) 46 Cal.4th 1183, 1203.)

Here, the evidence established that Doe had severe injuries to her face and nose. According to Doe’s neighbor, she landed on her back when she fell to the ground. It was undisputed she was naked. Such injuries to her face reasonably could be considered by the jury to have occurred based on defendant hitting Doe. Defendant admitted to several persons after the incident that he and Doe had argued but it had gotten “out of hand,” and/or “got a little bit ugly.” Moreover, defendant did not help Doe after she fell out the window. If Doe jumped out the window after arguing with someone on the telephone the jury could reasonably question why defendant did not rush to help her but rather stood nearby on the street. This was independent evidence not reliant on Doe’s testimony, showing that defendant had assaulted Doe and that he had done so with the intent to commit a sexual assault and attempted rape. Based on the foregoing, defendant cannot show prejudice from the exclusion of the sex tape.

B. EVIDENCE CODE SECTION 1108 EVIDENCE

Defendant claims the trial court abused its discretion by admitting Campbell’s testimony pursuant to Evidence Code section 1108.

1. *ADDITIONAL FACTUAL BACKGROUND*

Prior to trial, the People filed a trial brief in which it detailed four prior acts involving sexual misconduct committed by defendant. Three involved friends of defendant's stepdaughter who all claimed he made inappropriate comments to them. Further, the People made an offer of proof regarding a prior battery committed by defendant on February 25, 2008. He was a patient at an urgent care facility when he told the nurse's assistant, "I love your tits." He pulled her blouse out and looked down her top. She pulled back and her blouse snapped back. Defendant said, "that turns me on." Defendant touched the top of her breasts with his fingers, and held onto the loops on her pants. He slid his hand around her lower back. Defendant entered a guilty plea to battery (Pen. Code, § 242) on May 23, 2008. The People argued that these above offenses were admissible pursuant to Evidence Code sections 1101, subdivision (b) and 1108. The evidence was "particularly probative" because defendant would likely claim Doe was lying. It showed a pattern of unwanted touching of females. The incidents were also admissible to show intent.

The matter was heard by the trial court. The People imparted that the victim of the battery was available to testify. The other three victims had not been located but defendant had made statements about the other three incidents to a police officer.

The trial court ruled that the incident where the People were bringing in the witness to testify was "perfectly okay" to bring in. The trial court excluded the three other incidents as it would confuse the jury and consume too much time pursuant to

Evidence Code section 352. There was no objection from defendant's counsel to the admission of Campbell's testimony.

After the presentation of evidence, the jury was instructed, "The People presented evidence that the defendant committed the crime of sexual battery that was not charged in this case. This crime is defined for you in these instructions. [¶] You may consider this evidence only if the People have proved by a preponderance of the evidence that the defendant, in fact, committed the uncharged offense. Proof by a preponderance of the evidence is a different burden of proof from proof beyond a reasonable doubt. A fact is proved by a preponderance of the evidence if you conclude that it is more likely than not that the fact is true. [¶] If the People have not met this burden of proof, you must disregard this evidence entirely. [¶] If you decide that the defendant committed the uncharged offense, you may, but are not required to, conclude from that evidence that the defendant was disposed or inclined to commit sexual offenses, and based on that decision, also conclude that the defendant was likely to commit and did commit the charge set forth in Count 1, attempted rape, and/or Count 3, assault to commit rape as charged here. [¶] If you conclude that the defendant committed the uncharged offense, that conclusion is only one factor to consider along with all the other evidence. It is not sufficient by itself to prove that the defendant is guilty of Count 1 or Count 3. The People must still prove each charge and allegation beyond a reasonable doubt."

2. WAIVER

The People contend defendant waived any objection to the admission of Campbell's testimony by failing to object to the testimony in the trial court. A verdict or

finding shall not be set aside unless “[t]here appears of record an objection to or a motion to exclude or to strike the evidence that was timely made and so stated as to make clear the specific ground of the objection or motion” (Evid. Code, § 353, subd. (a); see also *People v. Hart* (1999) 20 Cal.4th 546, 615 [the failure at trial to interpose a timely objection constitutes waiver of the present challenge].)

Here, although defendant objected to the admission of evidence of the accusations made by the three friends of his stepdaughter, he never objected to the admission of Campbell’s testimony. As such, he has waived his right to present the challenge on appeal.

3. ANALYSIS

Even if we were to consider the merits of defendant’s claim, he is not entitled to relief on his claim that the Evidence Code section 1108 evidence was improperly admitted. Evidence Code section 1108, subdivision (a), provides as follows: “In a criminal action in which the defendant is accused of a sexual offense, evidence of the defendant’s commission of another sexual offense or offenses is not made inadmissible by Section 1101, if the evidence is not inadmissible pursuant to Section 352.” “[T]he Legislature’s principal justification for adopting section 1108 was a practical one: By their very nature, sex crimes are usually committed in seclusion without third party witnesses or substantial corroborating evidence. The ensuing trial often presents conflicting versions of the event and requires the trier of fact to make difficult credibility determinations. Section 1108 provides the trier of fact in a sex offense case the

opportunity to learn of the defendant’s possible disposition to commit sex crimes.’”

(*People v. Avila* (2014) 59 Cal.4th 496, 515 (*Avila*).)

“‘[Evidence Code s]ection 1108 preserves the trial court’s discretion to exclude evidence under [Evidence Code] section 352 if its prejudicial effect substantially outweighs its probative value.’” (*Avila, supra*, 59 Cal.4th at p. 515; see also *People v. Hernandez* (2011) 200 Cal.App.4th 953, 965.) The trial court considers several factors when making a determination under Evidence Code section 352 including “(1) whether the propensity evidence has probative value, e.g., whether the uncharged conduct is similar enough to the charged behavior to tend to show defendant did in fact commit the charged offense; (2) whether the propensity evidence is stronger and more inflammatory than evidence of the defendant’s charged acts; (3) whether the uncharged conduct is remote or stale; (4) whether the propensity evidence is likely to confuse or distract the jurors from their main inquiry, e.g., whether the jury might be tempted to punish the defendant for his uncharged, unpunished conduct; and (5) whether admission of the propensity evidence will require an undue consumption of time. [Citation.] A trial court balances this first factor, i.e., the propensity evidence’s probative value, against the evidence’s prejudicial and time-consuming effects, as measured by the second through fifth factors.” (*People v. Nguyen* (2010) 184 Cal.App.4th 1096, 1117.)

The trial court’s ruling admitting evidence under Evidence Code section 1108 is subject to review for abuse of discretion. (*Avila, supra*, 59 Cal.4th at p. 515; *People v. Story* (2009) 45 Cal.4th 1282, 1295.)

The evidence of the act against Campbell was probative to defendant's proclivity to make unwanted sexual advances. This was particularly relevant since the only witnesses to the interaction that night were Doe and defendant. It was clearly relevant to show defendant's intent to commit sexual assault and attempted rape. The acts committed by defendant against Doe and Campbell were sufficiently similar. Defendant pinned Campbell against the wall while touching her breast. Defendant sat on top of Doe and pinned her to the bed while he bit and/or sucked on her breasts. The admission of the prior uncharged offense helped to bolster Doe's credibility and show his "possible disposition to commit sex crimes.'" (*Avila, supra*, 59 Cal.4th at pp. 514-515.)

Additionally, this evidence was not remote or time consuming. Campbell briefly testified as to the interaction with defendant. This occurred in 2008, which was only a few years prior to the crime here. Additionally, the facts of the offense against Campbell were certainly less inflammatory than the acts against Doe where she suffered numerous facial fractures, was found naked on the ground outside her window, and defendant bit her breasts. The trial court did not abuse its discretion by finding that Campbell's testimony was properly admitted under Evidence Code section 1108.

Moreover, even if the trial court had excluded the evidence, it is not reasonably probable an outcome more favorable to defendant would have occurred. (*People v. Nguyen, supra*, 184 Cal.App.4th at p. 1120; see also *People v. Watson, supra*, 46 Cal.2d at p. 836.)

Initially, it is mere speculation on defendant's part that the jury was tempted to punish him for the prior crime by finding him guilty of the crimes against Doe.

Additionally, the jury was instructed they were only to consider the propensity evidence as one factor of his guilt along with all the other evidence. They were instructed the prior sexual battery was not sufficient by itself to prove that defendant was guilty of the attempted rape in count 1 or assault with intent to commit a sexual offense in count 3. We presume the jury followed the instructions. (*People v. Williams* (2009) 170 Cal.App.4th 587, 607.) They also were instructed they could only use such evidence as it pertained to the charges in counts 1 and 3. They also found defendant guilty of committing count 2, the assault by means of force likely to cause great bodily injury, which showed the jury believed Doe based on her testimony and injuries, and not based on the prior offense.

Finally, as set forth *ante*, the corroborating evidence was overwhelming that defendant assaulted Doe. Defendant has failed to show any prejudice from the admission of Campbell's testimony.

D. ABSTRACT OF JUDGMENT

The abstract of judgment lists the crime in count 2 as "assault w/deadly weapon." However, defendant was convicted of assault by means of force likely to cause great bodily injury. The abstract of judgment should be corrected to accurately reflect the jury's verdict. (*People v. Mitchell* (2001) 26 Cal.4th 181, 185 [a court has the power to correct clerical errors in records to reflect the true facts at any time].)

DISPOSITION

The trial court is directed to correct the abstract of judgment on count 2 to reflect that defendant was convicted of assault by means of force likely to cause great bodily

injury. The trial court is further directed to forward the corrected abstract of judgment to the California Department of Corrections and Rehabilitation. In all other respects, the judgment is affirmed.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

MILLER
J.

We concur:

RAMIREZ
P. J.

SLOUGH
J.